LAW TZY PING & ANOR.

v.

PUBLIC PROSECUTOR

HIGH COURT SABAH & SARAWAK, KUCHING
TUAN DENIS ONG JIEW FOOK J
[CRIMINAL APPEAL NO. KG. 11 OF 1988]
20 JUNE 1995

CRIMINAL LAW & PROCEDURE: *Charges - Section 4(c) Prevention of Corruption Act 1961 - Whether charge properly framed - Polis Di Raja Malaysia named as "agent" of Government of Malaysia to whom incriminating exhibits were given - Whether charge materially defective - Whether "agent" sufficiently specified - Whether Polis Di Raja Malaysia properly an "agent" of the Government of Malaysia in the context of a charge under s. 4(c) Prevention of Corruption Act 1961.*

CRIMINAL LAW & PROCEDURE: *Charges - Section 4 Prevention of Corruption Act 1961 - Abetment - Abetment charge did not mention any intention to deceive the principal - Whether fatal - Whether charge disclosed no offence known to law.*

INTERPRETATION: *Prevention of Corruption Act 1961 s. 2 - Definition of "agent" - Whether "agent" therein a natural person and a functionary - Polis Di Raja Malaysia - Whether a functionary - Whether a public body - Whether properly an agent of the Government of Malaysia.*

WORDS & PHRASES: *"agent" - "person" - Section 2 Prevention of Corruption Act 1961.*

This was an appeal by the appellants against their conviction and sentence in respect of offences under the Prevention of Corruption Act 1961. The first appellant was charged with two offences under s. 4(c) of the Act for *"knowingly giving to an agent of the Government of Malaysia, to wit, Polis Di Raja Malaysia, Kuching"* two document bills which were false in material particulars. The said bills were in respect of certain packed rations supplied by the first appellant to the Police Field Force Brigade, Sarawak. The second appellant, the officer certifying the receipt of the rations, was charged with abetting the first appellant. The facts showed that unlike the charges against the first appellant, the abetment charges against the second appellant did not expressly state that the bills in question *"were intended to mislead the principal"* with the knowledge of the second appellant.

On appeal the first appellant argued that the charges against him were defective as they did not specify the person to whom the bills were given. The definition of "agent" in s. 2 of the Act, the first appellant argued, required that such "agent" be a natural person who should be named in his official designation and that, Polis Di Raja Malaysia, being an abstract body, is not such a person. The second appellant contended that the omission to state any intention to deceive the principal in the charges against him was fatal as the charges, by reason of such omission, disclosed no offence known to law. The learned Deputy Public Prosecutor, while admitting the defects, maintained that they were curable by ss. 156 and 422 of the Criminal Procedure Code.

Before the learned appeal Judge the primary questions that arose were:

1. Whether Polis Di Raja Malaysia is an "agent" for the purposes of s. 2 of the Prevention of Corruption Act 1961, and if not, whether the error in specifying Polis Di Raja Malaysia as the agent in the charges herein rendered the charges materially defective.

2. Whether the abetment charges against the second appellant were improper bearing in mind the aforesaid omission.

Held:

[1] "Person" in the definition of "agent" in s. 2 Prevention of Corruption Act 1961 is a natural person and the expression "holder of the office" must therefore mean the person holding the office. The "agent", in other words, must be the functionary.

[2] Police Di Raja Malaysia is one of the public services listed in Art. 132(1) of the Federal Constitution, and is referred to as "the Force" in the Police Act 1967. It is a "public body" as that term is defined in s. 2 of the Prevention of Corruption Act, and not a functionary or an "agent" as defined in that section. Therefore, the charges, in stating Polis Di Raja Malaysia as the agent of the Government of Malaysia, are clearly defective. The particular member of the Force performing the duties of the office of the Commander, Police Field Force Sarawak Brigade, Kuching, to whom the document bills were addressed, should have been specified in both charges as the agent of the Government of Malaysia. This was not done.

[3] The error in specifying Polis Di Raja Malaysia as the agent in the charges is a material error. Had both charges correctly specified the holder of the office of the Commander, Police Field Force Sarawak Brigade, Kuching, as the agent of the Government of Malaysia, the Court below would not have held, as it had, that the prosecution had established the first ingredient of the charges beyond reasonable doubt without direct evidence being adduced from such Commander. The common error in the charges had thus occasioned a substantial failure of justice.

[4] The abetment charges against the second appellant were also improper. The second appellant was in law an "agent" of the Government of Malaysia as that term is defined by s. 2 of the Prevention of Corruption Act. The certification of the said document bills was required by the Treasury Instructions which apply to all public officers such as the second appellant. In his official capacity as Quartermaster of the said Battalion, or as a representative of the Commander, Police Field Force Sarawak Brigade, or as an agent of the Government of Malaysia, the second appellant could not be said to have "abetted". The acts of certifying the said documents, without more, were simply acts which he was required to do by the said Treasury Instructions.

[Appeal allowed. Conviction and sentence set aside. Both appellants acquitted and discharged]

Cases referred to:

Datuk Haji Harun bin Haji Idris v. PP [1977] 2 MLJ 155 (FC) ***(refd)***
Regina v. Ayres [1984] 1 AC 447 ***(refd)***
Tweedie [1984] 79 Cr. App. R. 168 ***(refd)***

Legislation referred to:

Prevention of Corruption Act 1961 (Revised 1971), ss. 2, 4 & 4(c)
Criminal Procedure Code, ss. 156 & 422
Police Act 1967 (Revised 1988), ss. 3(1) & 3(3)
Federal Constitution, Art. 132(2A)

For the 1st appellant - Fabian Lim; M/s. Fabian A.H. Lim
For the 2nd appellant - Anthony Tai; M/s. Anthony Tai
For the public prosecutor - Narimah Moris, DPP

JUDGMENT

Denis Ong Jiew Fook J:

The 1st appellant (1st accused) was charged in the Sessions Court Kuching as follows:

1st Charge:

That you, between 4 October 1982 and 26 February 1983 at the Police Field Force Brigade Headquarters, Kuching, in the State of Sarawak, did knowingly give to an agent of the Government of Malaysia, to wit, Polis Di Raja Malaysia, Kuching, a document bill No. 15/82 in respect of which the principal is interested and which document contains statement which are false in material particulars, namely it stated that you did supply packed rations in respect of LPO No. 286802 dated 2 October 1982 as below:

Type 'A' 2000 packets x RM15.75 = RM31,500

Type 'B' 2000 packets x RM15.65 = RM31,300

Type 'C' 2000 packets x RM16.33 = RM32,660

RM95,460

when in actual fact you only supplied 2880 packets of mixed type of packed rations, thus making a false claim of 3120 packets valued at RM49,639.20 (3120 packets x RM15.91 taking the average of tendered price) which had not been supplied and which to your knowledge was intended to mislead the principal and that you have thereby committed an offence punishable under s. 4(c) of the Prevention of Corruption Act 57/1961 (Revised - 1971).

2nd Charge:

That you, between 10 November 1982 and 26 February 1983 at the Police Field Force Brigade Headquarters, Kuching, in the State of Sarawak, did knowingly give to an agent of the Government of Malaysia, to wit, Polis Di Raja Malaysia, Kuching, a document bill No. 17/82 in respect of which the principal is interested and which document contains statements which are false in material particulars, namely it stated that you did supply packed rations in respect of LPO 286850 dated 9 November 1982 as below:

Type 'A' 2000 packets x RM15.75 = RM31,500

Type 'B' 2000 packets x RM15.65 = RM31,300

Type 'C' 2000 packets x RM16.33 = RM32,660

RM95,460

when in actual fact you only supplied 3840 packets of mixed type of packed rations, thus making a false claim of 2160 packets valued at RM34,365.60 (2160 packets x RM15.91 taking the average of tendered price) which had not been supplied and which to your knowledge was intended to mislead the principal and that you have thereby committed an offence punishable under s. 4(c) of the Prevention of Corruption Act 57/1961, (Revised - 1971).

The 2nd appellant (2nd accused) was separately charged in the Sessions Court Kuching as follows:

1st Charge:

That you, between 4 October 1982 and 26 February 1983, at the Police Field Force Brigade Headquarters, Kuching, in the State of Sarawak, abetted the commission of an offence by

Law Tzy Ping, under s. 4(c) of the Prevention of Corruption Act 57/1961 for knowingly giving to an agent of the Government of Malaysia, to wit, Polis Di Raja Malaysia, Kuching, a document bill No. 15/82 in respect of which the principal is interested and which document contains statements which are false in material particulars, namely it stated that he did supply packed rations in respect of LPO No. 286802 dated 2 October 1982 as below:

Type 'A' 2000 packets x RM15,75 = RM31,500

Type 'B' 2000 packets x RM15.65 = RM31,300

Type 'C' 2000 packets x RM16.33 = RM32,660

RM95,460

when in actual fact he only supplied 2880 packets of mixed type of packet rations, thus making a false claim of 3120 packets valued at RM49,639.20 (3120 packets x RM15.91 taking the average of tendered price) which had not been supplied, which offence was committed in consequence of your abetment in that you certified in the said bill No. 15/82 that the packed rations had been received, and that you have thereby committed an offence punishable under s. 4 of the Prevention of Corruption Act 57/1961 (Revised - 1971).

2nd Charge:

That you, between 10 November 1982 and 26 February 1983 at the Police Field Force Brigade Headquarters, Kuching, in the State of Sarawak abetted the commission of an offence by Law Tzy Ping, under s. 4(c) of the Prevention of Corruption Act 57/1961 for knowingly giving to an agent of the Government of Malaysia, to wit, Polis Di Raja Malaysia, Kuching, a document bill No. 17/82 in respect of which the principal is interested and which document contains statements which are false in material particulars, namely it stated that he did supply packed rations in respect of LPO No. 286850 dated 9 November 1982 as below:

Type 'A' 2000 packets x RM15.75 = RM31,500

Type 'B' 2000 packets x RM15.65 = RM31,300

Type 'C' 2000 packets x RM16.33 = RM32,660

RM95,460

When in actual fact he only supplied 3840 packets of mixed type of packed rations, thus making a false claim of 2160 packets valued at RM34,365.60 (2160 packets x RM15.91 taking the average of tendered price) which had not been supplied which offence was committed in consequence of your abetment in that you certified in the said bill No. 17/82 that the packed rations had been received, and that you have thereby committed an offence punishable under s. 4 of the Prevention of Corruption Act 57/1961 (Revised - 1971).

They were jointly tried and on 20 November 1987 were found guilty, convicted and sentenced by the Court below on each count to a term of 2 years' imprisonment to run consecutively and in addition in the case of the 1st accused, a fine of RM5,000 for each count in default of payment, another six months' imprisonment each. Against both convictions and sentences they appeal to this Court.

The petition of appeal dated 2 July 1988 of the 1st appellant (encl. (4)) listed fifteen grounds in all and at the outset of the hearing of the appeal Mr. Fabian Lim, learned Counsel for the 1st appellant, tendered his "brief notes of submission" dated 15 December 1994 which was received into the Court file and marked encl. (35). His first complaint in ground (a) in respect of both charges against the 1st appellant was that both charges were defective in that they did not specify the "agent" to whom Bill No. 15/82 (Ex. P5) and Bill No. 17/82 (Ex. P8) were

given. What were stated in both charges were "Polis Di Raja Malaysia". He pointed out that "agent" in s. 4(c) of Act 57 is defined in s. 2 of the same Act to mean "any person employed by or acting for another ... and a person serving under any public body." Mr. Lim said that the definition of "agent" required that such "agent" be a natural person and such person must be named in his official designation in both charges. He said that "Polis Di Raja Malaysia" was an abstract body and not a natural person named in his official designation. The learned Deputy Public Prosecutor in her outline of submission tendered and marked encl. (42) of the Court file conceded at pp. 1 and 3 thereof that there was a defect in both charges against the 1st appellant in that they did not specify a person who received Exhs. P5 and P8 from the 1st appellant. She added orally that Exhs. P4, P5, P7 and P8 nevertheless had to be processed by the personnel of the finance section of Polis Di Raja Malaysia and that fulfilled the requirement of human persons in the definition of "agent". Although defective, she submitted that such defect in both charges was curable under ss. 156 and 422 of the Criminal Procedure Code (FMS Cap. 6) and further that there was evidence on record to show that Exhs. P5 and P8 were submitted to agent i.e., Polis di Raja Malaysia.

"Agent" is defined to mean any person employed by or acting for another, and includes ... a person serving under any public body, ..." The question here is whether Polis Di Raja Malaysia is an "agent" for the purposes of s. 2 of Act 57. That question must be determined by construing the words of s. 2 and by applying the section to the holder of the office in a particular case as was done in the case of the holder of the office of additional Superintendent Registrar in *Regina v. Barrett*, a decision of the English Court of Appeal: see *Datuk Haji Harun bin Haji Idris v. PP* [1977] 2 MLJ 155 (FC) at p. 179 right column H. In that case the Federal Court referred to the appointment, remuneration and tenure of office of the appellant and reviewed his functions under the State Constitution as a member of the Executive Council, in the Ruler-in-Council and in the performance of his duties as Menteri Besar in arriving at a finding that the appellant acted for the Sultan and serving under the Sultan although the Sultan could not dismiss him or reject his advice. It therefore held that in the circumstances of that case he was an agent within the meaning of s. 4(a) of Act 57. At p. 180 left column C, the Federal Court said:

> All functions performed by the accused in relation to the state were functions of the Sultan as symbol of the State Government. Like the Minister of State in *Wee Toon Boon v. PP* [1976] 2 MLJ 191 the accused too, in the performance of his duties as Mentri Besar, was clearly acting for the Sultan's Government, it being necessary for the Government to exercise its functions through some human agency, and in receiving remuneration for the performance of his duties and the discharge of his responsibilities as Menteri Besar he clearly was a person employed by or serving under the Sultan.
>
> We are of the opinion that in the circumstances of this case the Sultan and State Government are synonymous.

It will be observed from the excerpt quoted that use of the expression "human agency" must mean that "person" in the definition of "agent" in s. 2 is a natural person and the expression "holder of the office" must therefore mean the person holding the office, in other words, the "agent" must be the functionary.

In the context of our present case, the issue is whether Polis Di Raja Malaysia is a functionary. Polis Di Raja Malaysia or the Royal Malaysia Police is one of the public services listed in Art. 132(1) of the Federal Constitution. The Royal Malaysia Police was initially established under the Royal Malaysia Police Act 1963 and continued under the Police Act 1967 (Act 41/67) and now Act 344 (revised - 1988). In Act 344, the Royal Malaysia Police is referred to as "the Force". Polis Di Raja Malaysia thus is a public service, or an establishment. It is a

"public body" as that term is defined in s. 2 of Act 57 and not a functionary or an "agent" as defined in s. 2. Consequently, both charges against the 1st appellant are wrong insofar as they stated Polis Di Raja Malaysia as the agent of the Government of Malaysia.

The functions of the Force as provided for in s. 3(3) of Act 344 are to maintain law and order, to preserve the peace and security of Malaysia, to prevent and detect crime, to apprehend and prosecute offenders and to collect security intelligence. These functions are functions of the Federal Government as provided in item 3 of Legislative List 1 of the 9th Schedule to the Federal Constitution. Section 3(1) of Act 344 speaks of members of the Force and Art. 132(2A) provides that members of the Police Force hold office during the pleasure of the Yang di Pertuan Agung. In the premises, members of the Force are in law public servants of the Government of Malaysia. As such, members of the Force are the functionaries and therefore "agent" within the meaning of that term in s. 2 of Act 57. In the context of both charges against the 1st appellant, the particular member of the Force holding or performing the duties of the office of Commander, Police Field Force Sarawak Brigade Kuching to whom Exhs. P5 and P8 were addressed, should have been specified in both charges as the agent of the Government of Malaysia. That was not done; instead, Polis Di Raja Malaysia was specified as the agent.

The question then is, is the error in specifying Polis Di Raja as the agent in the charges, a material error and was the 1st appellant or the Court below misled as a result. In my view the error was a material one and both the 1st appellant and the Court below would appear to have been mistaken into thinking that Polis Di Raja Malaysia was the agent of the Government of Malaysia. The 1st appellant made no objection to the charges on this point and the Court below in considering the first ingredient common to both charges at p. 235 of the appeal record did not direct its mind at all to the question whether the Commander PFF Sarawak Brigade Kuching was the agent of the Government of Malaysia. Instead, at pp. 243 to 244 of the appeal record, the Court below in considering the second ingredient of the offence, in particular intent to mislead the Government of Malaysia, proceeded on the basis that the Police Department was an executive arm of such Government. In my view too, that had both charges correctly specified the holder of the office of Commander PFF Sarawak Brigade Kuching as the agent of the Government of Malaysia, it would not have held (as it had held) that the prosecution had established the first ingredient of the charges beyond reasonable doubt without direct evidence adduced from such commander himself considering that PW7 and PW9 purported to have acted on his behalf as warrant holder and the person with authority to approve substitutes for packed rations ordered. In the premises, I am of the opinion that there had been a substantial failure of justice occasioned by the common error in both charges against the 1st appellant.

The petition of appeal of the 2nd appellant dated 1 July 1988 (encl. (5)) listed eleven grounds against conviction and three grounds against sentence. In the course of his submission Mr. Tai abandoned grounds 4(a) and (b). At the outset of his submission, Mr. Tai tendered a "summary of grounds of appeal" dated 12 December 1994 which was received into the Court file and marked encl. (37).

Mr. Tai commenced his submission by attacking the validity of both charges of abetment against the 2nd appellant and of the consent to prosecute dated 6 January 1984 signed by the learned Deputy Public Prosecutor (Ex. P1(B)). He attacked them under para. 5 of the petition. Paragraph 5 reads as follows:

> In any event, the appellant contends that the judgment of the learned trial President cannot be supported having regard to the evidence.

He dealt briefly on the charges at p. 2 of encl. (37) and nothing therein was mentioned about the consent to prosecute. In his oral submission, he dealt with both the charges and the consent to prosecute. I must mention here that initially I was at a loss to follow him. As I understand it, para. 5 talked of the evidence adduced at the trial and whether such evidence supported those charges against the 2nd appellant. Nowhere in para. 5 was there mention of charges or consent to prosecute specifically. I thought learned Counsel's move was far-fetched because to my mind, in no sense can para. 5 be read or construed to include a ground or grounds of attack on such charges and consent to prosecute. Naturally, I queried Mr. Tai. The learned Deputy Public Prosecutor also objected to Mr. Tai submitting on the validity of the charges and consent to prosecute. I heard both parties on this objection and ruled in the interest of justice to allow Mr. Tai to proceed. The crux of Mr. Tai's complaint was that in both charges against the 2nd appellant, the Public Prosecutor omitted to state expressly that the documents (i.e., Exhs. P5 and P8) which allegedly contained false particulars were intended to mislead the principal with the knowledge of the 2nd appellant. As a result of such omission, he argued that the charges and the consent to prosecute disclosed no offence known to the law and were therefore bad. Hence, he submitted that the entire trial was a nullity and the conviction of the 2nd appellant ought to be quashed. The learned Deputy Public Prosecutor in her "outline of submission" on the 2nd appellant (encl. (43)) at p. 1 conceded such defect in both charges but argued that such defect was curable under ss. 156 and 422 of FMS Cap. 6 and there was no miscarriage of justice or that the 2nd appellant was prejudiced in his defence and relied on *Regina v. Ayres* [1984] 1 AC 447 at p. 460. Hence, she submitted that the consent to prosecute was valid and operative and the trial in the Court below not a nullity.

In the first place, are the abetment charges against the 2nd appellant proper. The acts of abetment complained of against the 2nd appellant in both charges specified in the consent to prosecute (Exh. P1(B)) were that he certified in Exhs. P5 and P8 that he received the packed rations and that in consequence of such abetment, the offences were committed by the 1st appellant. The certification in both Exhs. P5 and P8 read thus:

> I hereby certify that the above stores have been received and:
>
> (a) taken on ledger charge (Folio No ...)
>
> (b) taken on inventory charge;
>
> (c) brought into immediate use,
>
> (Sgd)
>
> ...
>
> Officer receiving store.

Such a certification is required by TI 93(ii) read with TI 98(e)(ii) of Treasury Instructions which apply to all public officers and binding on accounting officers. It is in evidence that the signatures appearing above "Officer receiving store" in both certifications were those of the 2nd appellant. The certifications were done in the course of his duty as Quartermaster, 18th Battalion, PFF, Miri and as representative of the Commander, Police Field Force Sarawak Brigade Kuching. As Quartermaster and the officer receiving store, the 2nd appellant was an "accounting officer" as that term is defined in TI 3. The certification of Exhs. P5 and P8 was in fact the official act of an employee of the Government of Malaysia, an officer serving in the Police Force and a representative of the Commander, Police Field Force Sarawak Brigade Kuching. The 2nd appellant was in law an "agent" of the Government of Malaysia as that

term is defined in s. 2 of Act 57. In his individual, personal and private capacity, the 2nd appellant had no business or power to make those certifications. Thus he could not have abetted the Commission of the offence by the 1st appellant. In his official capacity as agent of the Government, the 2nd appellant could not be said to have "abetted" because the certifications were acts required of him to do by the Treasury Instructions. Thus do I consider the abetment charges against the 2nd appellant improper. However, as an agent of the Government, the 2nd appellant could, under s. 4(c) of Act 57, have been charged (but not so charged) for "knowingly use with intent to deceive his principal" Exhs. P5 and P8 in respect of which his principal was interested and which contained statement which were false in material particulars. As Lawton LJ said in *Tweedie* [1984] 79 Cr. App. R. 168 at p. 172:

> As Hobhouse J pointed out in the course of argument, the words "receipt" and "account" in the third paragraph, as a matter of the ordinary use of English, refer to documents *inter partes* either in creation or use. A receipt is made out to someone who has paid a debt. An account is rendered by one person to another. The words "or other document" should, in our judgment, be construed as meaning a document which would pass *inter partes*. Such documents are capable of being **given** by a third party and then **used** by an employee. Both or one or other can be guilty of the offence created by the third paragraph if there is proof of the knowledge and intent specified. All the words following "intent to deceive his principal" are words common to the definition of an offence by a third party or an employee.

In the premises, I am of the view that both charges against the 2nd appellant in the consent to prosecute are improper.

In the view I express of the charges against the 1st and 2nd appellants, I do not consider it necessary to deal with the remaining grounds of appeal.

For the reasons stated, I will allow the appeals by both appellants, set aside their convictions and sentences passed by the Court below and order their acquittal and discharge. I order accordingly. Further, I order the exhibits to be returned to the Anti-Corruption Agency after the appeal period lapses and if there is no appeal.